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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NOLBERTO RESENDIZ and MARTIN FRANK ARROYO, Defendants and Appellants.	G043741 (Super. Ct. No. 08ZF0026) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Nolberto Resendiz.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Martin Frank Arroyo.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Marilyn L. George and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Nolberto Resendiz and Martin Arroyo of two counts of attempted premeditated murder and one count of street terrorism. It also convicted Arroyo of discharging a firearm from a motor vehicle and found true various enhancement allegations, including that the attempted murders were committed for the benefit of a criminal street gang. On appeal, we reject appellants' claims that their convictions should be reversed due to insufficient evidence and evidentiary error. However, we do agree with them that the trial court should have 1) stayed their sentences for street terrorism, and 2) sentenced Resendiz to life in prison with parole, as opposed to 15 years to life, on the attempted murder counts. We will modify appellants' sentences accordingly and affirm the judgment in all other respects.

FACTS

Appellants are members of a criminal street gang called Fullerton Tokers Town (FTT). FTT's primary rival is the Buena Park Eastside Gang (Eastside), of which victim Andrew Wynglarz was previously a member. Andrew's brother Shane, also a victim in this case, has never been in a gang. However, he did have a personal beef with FTT members Antonio and Jovany Duran.

In mid-July 2007, Shane had a run-in with Antonio at a Chuck-E-Cheese restaurant. Antonio was "talking trash" and shouted out "Fullerton," but nothing more transpired between them at that time. A few weeks later, on July 30, the police detained several gang members, including appellants, on Franklin Street in FTT claimed territory. During the encounter, the police found a baggie containing seven .22 caliber bullets on the ground where the detention occurred.

Later that evening, a group of Shane's friends were driving around in a Dodge Charger when the Duran brothers pulled up next to them in a Chevy Suburban at an intersection. "Words were exchanged," with the people in the Charger swearing and staring menacingly at the Durans, which Antonio took as a challenge to fight. But in the

end, the two cars drove their separate ways; the Suburban went to Franklin Street, and the Charger went to Shane and Andrew's house.

When the Duran brothers arrived on Franklin Street, they recruited several FTT members to help them out. As Antonio testified at trial, "I wanted to make it a fair fight, so I wanted to take some guys with me." Jovany was even more frank; he told the police he and his friends wanted to settle the score with the people in the Charger. To that end, appellants got in the middle row of the Suburban, and two more FTT members got in the back, bringing the number of gang members in the vehicle to six. Knowing the people in the Charger were Shane's friends, the group set off for Shane and Andrew's house, which is located in Eastside claimed territory.

When they arrived there, Shane was standing at the front of the house with several other people. After the Suburban passed by the house, he went inside and got Andrew. They hurried into the street. By then, the Suburban had turned around and was heading back toward them. The Suburban stopped about one house away from where Shane and Andrew were standing. Then, without warning, there was a barrage of gunfire from the driver's side of the vehicle. Shane and Andrew couldn't tell who fired the shots or how many shooters there were. However, Antonio, the wheelman, testified Arroyo was the sole shooter. Antonio explained that after he stopped the Suburban, Arroyo stepped outside and fired several shots in rapid succession from a .22 caliber revolver. One of the shots grazed Andrew's head. As he fell to the ground, the Suburban drove away.

In the wake of the shooting, appellants were arrested. Arroyo told the police he got into the Suburban because he wanted to back up the Duran brothers. He admitted they went over to Shane's house because the Duran brothers had been disrespected during their earlier encounter with Shane's friends. Arroyo also knew he was going into the victims' territory. He claimed that when they reached Shane's house, some "big fools" rushed their vehicle. He stepped out to fight, but when he heard the

gunshots, he thought he was under fire, so he jumped back into the Suburban, and they drove away. Arroyo claimed neither he nor any of his companions had a gun.

Resendiz told the police that when his group arrived at Shane's house, he saw a "little mob" of people hiding behind cars, making hand gestures. The mob rushed the Suburban, so he and his companions prepared to get out and start fighting. But then shots rang out, so they took off instead. Resendiz claimed he had no idea who fired the shots.

Fullerton Police Officer Vincent Mater testified as the prosecution's gang expert. He stated gangs earn respect through violence, especially gun-related violence. And when a gang member has a gun, he is expected to share that information with other members of his gang. Gang members are also expected to back each other up and assist each other when they are committing crimes. They will not hesitate to retaliate against anyone who disrespects their gang, even if the person is not a gang member.

Speaking to the crimes committed by FTT members, Mater said they are primarily involved in robbery, felony vandalism, and felony assault. He believed the facts of this case smacked of a gang shooting, in that appellants and their fellow FTT members traveled into rival territory with a gun following a run-in with friends of the victims. Although the victims were not gang members, the shooting would enhance FTT's reputation for violence, embolden other members of the gang to commit crimes, and instill fear and intimidation in the community at large. Therefore, it was Mater's opinion the shooting was carried out for the benefit of FTT.

At trial, the defense did not present any evidence. In closing arguments, defense counsel argued appellants were the ones who were shot at, not Shane and Andrew. They also asserted the shooting arose out of personal animosity and had nothing to do with the fact appellants and their friends in the Suburban were all gang members.

The prosecution theorized Arroyo was the shooter and Resendiz was liable as an accomplice. The prosecutor also argued that, regardless of which FTT member fired the shots, appellants would still be liable for attempted murder under the natural and probable consequences doctrine.

The jury found appellants guilty of two counts of attempted premeditated murder and one count of street terrorism, and it convicted Arroyo of shooting from a motor vehicle. (Pen. Code, §§ 664, 187, subd. (a), 186.22, subd. (a), 12034, subd. (c).)[1] In addition, the jury found the attempted murders were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)) and, during their commission, a principal personally used and intentionally discharged a firearm (§ 12022.53, subds. (b), (c) & (e).) With regard to the attempted murder of Andrew and the shooting from a vehicle offense, it was further alleged that a principal personally and intentionally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (d) & (e).) However, the jury was unable to reach a verdict on that allegation, and it was eventually dismissed.

The court sentenced appellants to concurrent terms of life in prison on the attempted murder counts and set a 15-year minimum parole eligibility pursuant to section 186.22, subdivision (b)(5). It also imposed a consecutive 20-year enhancement under section 12022.53, subdivisions (c) and (e), based on the firearm finding. Although the court gave Arroyo an additional 3 years on the street terrorism count, it stayed his sentence for shooting at a vehicle under section 654; it sentenced Resendiz to a concurrent term of 16 months for street terrorism. This appeal followed.

I

Appellants contend there is insufficient evidence to support their convictions for street terrorism or the true findings on the gang allegations attendant to the attempted murder counts. We disagree.

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1 All further statutory references are to the Penal Code.

In reviewing the sufficiency of the evidence to support a criminal conviction, we review the record "'in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Stuedemann* (2007) 156 Cal.App.4th 1, 5.) We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

A person is guilty of the crime of street terrorism if he 1) actively participates in a criminal street gang, 2) knows of the gang's criminal activities, and 3) willfully promotes, furthers, or assists in any felonious criminal conduct by its members. (§ 186.22, subd. (a).) In addition, "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members," shall receive enhanced punishment "in addition and consecutive to the punishment prescribed for the felony . . . ." (§ 186.22, subd. (b).)

Appellants' challenge to their street terrorism convictions requires little discussion. They claim the convictions must be reversed because the felonious criminal conduct at issue, i.e., the shooting, was not shown to be "gang-related." However, in *People v. Albillar* (2010) 51 Cal.4th 47, our Supreme Court ruled the crime of street terrorism, unlike the gang enhancement set forth in section 186.22, subdivision (b), does not require the felonious conduct in question to be gang-related crime. Therefore, appellants' claim fails at the outset.

Turning to the gang enhancement, appellants argue there is insufficient evidence to support the jury's finding the shooting was committed "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b).)

Appellants argue the shooting was carried out strictly for personal, non-gang reasons, but there is substantial evidence to the contrary.

Appellants would have us believe FTT is a small potatoes gang, unaccustomed to gun violence. But as officer Mater explained, two of the gang's primary activities are robbery and felony assault, which includes assault with a firearm. (§ 245, subd. (a)(2).) Therefore, it is safe to assume the gang has a certain familiarity with guns. In fact, on the afternoon of the shooting, the police found a baggie full of .22 caliber bullets in the area where appellants and several other FTT members were detained.

A few hours later, FTT members Antonio and Jovany Duran had a run-in with several of Shane's friends on the roadway. During the confrontation, Shane's friends "maddogged" the Durans, which Antonio admitted is a common method by which gang members challenge each other to fight. However, instead of taking up the challenge at that time, Antonio and Jovany high-tailed it over to Franklin Street and recruited appellants and two other FTT members. Feeling the Durans had been insulted, the group was anxious to settle the score. So, they headed over to Shane and Andrew's house with a gun in their possession. Since, as Mater explained, respect is everything to gangs, swift and severe retaliation was to be expected.

Shane and Andrew's residence is located inside the claimed territory of one of FTT's chief rivals, Eastside. And when appellants' group arrived there, they were met by a "little mob" of people who were "throwing up their hands" and eventually came rushing toward them. Appellants were not deterred, though. As soon as Antonio stopped the Suburban, Arroyo stepped out and fired several shots from a .22 caliber revolver, striking former Eastside member Andrew in the head. Fortunately, Andrew was not seriously injured, but as Mater explained, the shooting would still benefit FTT by demonstrating its willingness and capacity to commit acts of violence and revenge. Given Mater's opinion in that regard, and the totality of the circumstances surrounding

the shooting, there is substantial evidence to support the jury's true finding on the gang allegations.

We are mindful there was evidence the impetus for the shooting may have stemmed from personal animosity between the Duran brothers and the victims. But that does not negate the possibility appellants' actions were motivated, at least in part, by a desire to promote their gang. Considering the totality of events, the jury could reasonably find appellants acted for the benefit of and with the specific intent to promote their gang in carrying out the shooting. We therefore reject appellants' challenge to the sufficiency of the evidence on the gang enhancement. (*People v. Albillar, supra*, 51 Cal.4th at p. 62 [where there is conflicting evidence as to the motive for defendant's crime, the jury is entitled to credit the evidence the crime was gang related, so as to support a true finding on the gang allegation].)

II

Resendiz also contends there is insufficient evidence to support his conviction for attempted murder under the natural and probable consequences doctrine. Again, we disagree.

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) "For a criminal act to be a . . . 'natural and probable' consequence of another criminal design it is not necessary that the . . . act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the" target crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530-531.) Rather, the criminal act need only be a reasonably foreseeable consequence of the targeted offense. (*Ibid.*)

As the court in *People v. Nguyen, supra*, explained, "The determination whether a particular criminal act was a natural and probable consequence of another

criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.] This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 531.)

In this case, the jury was instructed on four target offenses, assault, battery, assault by means likely to cause great bodily injury and disturbing the peace by fighting. Resendiz argues there are two reasons why attempted murder was not a natural and probable consequence of these offenses. First, "the prosecution presented no evidence that [he] knew Arroyo had a revolver in his possession, or that [he] knew that Arroyo was the type of person who would carry a gun with him." Second, "there was no evidence [FTT] was a violent street gang that was known to commit gun offenses."

Resendiz is correct about the lack of direct evidence showing he knew about Arroyo's gun. However, gang expert Mater testified FTT's primary activities include robbery and felony assault, two crimes which commonly involve the use of a firearm. He also explained that because gangs earn respect through violence and intimidation, and "everybody fears a gun," guns are the "ultimate [source of] power" for gang members. Moreover, when a gang member has a gun, he is expected to let his fellow gang members know about it. Disclosure of this information is so imperative, explained Mater, that a gang member will often receive retaliation if he keeps it to himself. Mater's testimony about the role guns play in gangs does not definitively prove Resendiz knew about the gun prior to the shooting. But it does constitute evidence from which the jury could infer that he did.

Even if Resendiz did not know Arroyo was armed, that would not shield him from liability for Arroyo's actions under the natural and probable consequences doctrine because "prior knowledge that a fellow gang member is armed is not necessary to support" a conviction for murder or attempted murder under that doctrine. (*People v. Medina* (2009) 46 Cal.4th 913, 921.) "[A]lthough evidence indicating whether the defendant did or did not know a weapon was present provides grist for argument to the jury on the issue of foreseeability of a homicide, it is not a necessary prerequisite." (*People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5.)

Assessing the foreseeability of the shooting in this case, it is important to keep in mind appellants hooked up with the Duran brothers right after Antonio and Jovany had been insulted by Shane's friends. In joining their fellow gang members in the Suburban, appellants were clearly out to help avenge that loss of face. And they knew they had to travel into rival territory to do so. A violent response was highly predictable under these circumstances because, as Mater explained, "A gang that is considered easy to walk over is going to get attacked by every other" gang in the community.

As for the severity of the response, Mater's testimony made it clear gang members operate on the principle that the more violent they are, the more respect they will obtain. Thus, a response involving more than simple fisticuffs could reasonably be expected, especially from a gang whose primary activities include assault with a firearm. Given all of the facts leading up to the shooting, there is substantial evidence to support the conclusion a reasonable person in Resendiz's shoes would or should have known attempted murder was a reasonably foreseeable consequence of his actions in aiding and abetting the target offenses. Therefore, we affirm his convictions for that crime.

III

As a lesser included offense of attempted murder, the trial court instructed the jury on attempted voluntary manslaughter under the theory of imperfect self-defense. Although appellants did not rely on that theory at trial, they contend the court's

instructions on imperfect self-defense were flawed because they did not comply with section 1097 and *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*). We cannot agree.

Section 1097 provides, "When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only." In *Dewberry,* the California Supreme Court determined section 1097 also applies when the evidence is sufficient to support a finding of guilt of a charged offense and a lesser included one. In that situation, the court ruled, the jurors must be instructed that if they have a reasonable doubt which crime the defendant committed, they must give the defendant the benefit of the doubt and find him guilty of the lesser crime, provided they are convinced beyond a reasonable doubt he is guilty of that offense. (*Id*. at pp. 555-556.)

Per CALCRIM No. 3517, the judge in the instant case told the jurors, "Attempted voluntary manslaughter is a lesser crime of attempted murder as charged in counts 1 and 2.

"It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

"You will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these directions before you give me any completed and signed final verdict form. Return any unused verdict forms to me, unsigned.

"If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty for that crime. Do not complete or sign any other verdict form for that count.

"If all of you cannot agree whether the People have proved beyond a reasonable doubt that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form for that count.

"If all of you agree that the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime and you also agree that the People have proved beyond a reasonable doubt that he is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime.

"If all of you agree that the People have not proved beyond a reasonable doubt that defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime.

"If all of you agree the People have not proved beyond a reasonable doubt that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only that you cannot reach an agreement about the lesser crime."

Appellants claim this instruction was inadequate because it failed to inform the jurors that if they had reasonable doubt about whether appellants committed attempted murder or attempted voluntary manslaughter, they must find appellants guilty of the lesser offense. However, "[i]f a jury is convinced beyond a reasonable doubt that a defendant is guilty of either a greater or lesser offense, this can only be because it has a reasonable doubt about elements of the greater offense and no reasonable doubt about the elements of the lesser. Under these circumstances, [CALCRIM No. 3517] instructs the jury to convict of the lesser offense" and therefore it comports with *Dewberry*. (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791 [discussing CALCRIM No. 3517's predecessor, CALJIC No. 17.10.]; accord, *People v. Crone* (1997) 54 Cal.App.4th 71, 76;

People v. Gonzalez (1983) 141 Cal.App.3d 786, 793, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 521-522.)

Appellants also attack CALCRIM No. 3517 on the basis it "implicitly requires an order of deliberation which results in an 'all-or-nothing' decision on the greater offense before the jury can proceed in deliberating upon the lesser offense." If the instruction was worded so as to require an acquittal on the greater offense before allowing the jury to *consider* the lesser offense, it would no doubt be objectionable. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1073.) However, CALCRIM No. 3517 merely restricts the jury from *returning* a verdict on the lesser offense before acquitting on the greater offense, which is entirely proper. (*Ibid*.) Because CALCRIM No. 3517 leaves the order of deliberations up to the jury, its use in this case did not violate appellants' rights.

IV

Appellants also challenge CALCRIM No. 604, which sets forth the elements of imperfect self-defense. They contend the instruction lowered the prosecution's burden of proof and invaded the jury's deliberative process by implying appellants were guilty of attempted murder, as opposed to attempted voluntary manslaughter. However, that is not the case.

Pursuant to CALCRIM No. 604, the jury was instructed an attempted killing that would otherwise constitute attempted murder is "reduced" to attempted voluntary manslaughter if defendants attempted to kill a person because they acted in imperfect self-defense or defense of another, i.e., in the honest but unreasonable belief they needed to defend themselves or another. The jurors were also told the People had the burden of proving beyond a reasonable doubt defendants did not act in imperfect self-defense, and if the People did not meet this burden they must find defendants not guilty of attempted murder.

Appellants take issue with the word "reduced" in CALCRIM No. 604, claiming it improperly implied they were presumptively guilty of attempted murder unless the evidence showed otherwise. Appellants liken CALCRIM No. 604 to an instruction impugned in *People v. Owens* (1994) 27 Cal.App.4th 1155. But the instruction in *Owens* told the jury the prosecution had introduced evidence tending to prove its case. (*Id*. at p. 1158.) While such an instruction carries an impermissible inference of guilt (*ibid*.), CALCRIM No. 604's use of the word "reduced" does no such thing. Rather, it simply reflects the fact attempted voluntary manslaughter is a lesser offense than attempted murder. Using the word "reduced" in this context is an entirely appropriate way to describe what occurs when imperfect self-defense negates malice and mitigates the defendant's culpability from attempted murder to attempted voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) Therefore, CALCRIM No. 604 did not lessen the prosecution's burden of proof on the issue of imperfect self-defense.

Nor did it invade the jury's deliberative process. Appellants contend that by creating a presumption they were guilty of attempted murder, CALCRIM No. 604 effectively directed the jurors to focus on that crime first before allowing them to consider the crime of attempted voluntary manslaughter. However, as explained above, we do not believe CALCRIM No. 604 created a presumption in favor of one offense or another. Instead, it simply described the elements of imperfect self-defense which, if not disproven by the prosecution, would compel a verdict of attempted manslaughter. Moreover, CALCRIM No. 3517, discussed in the previous section, informed the jurors they could consider the crimes of attempted murder and attempted voluntary manslaughter in whatever order they wished. Therefore, appellants' critique of CALCRIM No. 604 is not well taken.

Even if the court's instructions on imperfect self-defense were somehow flawed, that would not necessitate a reversal in this case. As explained above, appellants

did not rely on imperfect self-defense at trial, but instead defended the charges on the basis they were not the shooters. The jury rejected their version of events and convicted them of attempted premeditated murder. In so doing, the jury necessarily rejected the notion the shooting was done in imperfect self-defense. Any error in instructing on that theory was therefore harmless. (*People v. Manriquez* (2005) 37 Cal.4th 547, 582.)

V

Next, we consider whether appellants were properly punished for both street terrorism and the felonious conduct underlying that offense, i.e., the attempted murders.[2] Appellants contend the multiple punishment prohibition in section 654 mandates that their sentences for street terrorism be stayed, and we agree.

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) "Although section 654 speaks in terms of an 'act or omission,' it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. [Citation.]" (*People v. Meeks* (2004) 123 Cal.App.4th 695, 704.) "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

Our Supreme Court is currently considering how section 654 applies in the context of the crime of street terrorism. (See *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted Oct. 27, 2010, S185688; *People v. Duarte* (2010) 190 Cal.App.4th

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[2] As explained above, the court sentenced Arroyo to a consecutive three-year term on the street terrorism count and Resendiz to a concurrent sixteen-month term.

82, review granted Feb. 24, 2011, S189174.) Because the crime requires as an elemental component "felonious criminal conduct," some intermediary courts have determined section 654 precludes punishment for both street terrorism and the underlying felony. (See, e.g., *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315.) However, some courts have found section 654 inapt on the basis the mens rea for street terrorism — the intent to participate in a criminal street gang — is not inherent in the underlying felony. (See, e.g., *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466-1468; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; see generally *People v. Nunes* (2011) 200 Cal.App.4th 587 [discussing split of opinion on this issue].) The Attorney General urges us to follow the latter approach, but doing so does not lead to the conclusion that separate punishment was justified in this case.

According to the Attorney General, appellants were properly punished for attempted murder and street terrorism because in carrying out those crimes they harbored separate intents, i.e., the intent to fight, the intent to kill and the intent to support their gang. The state submits, "The intent to kill supported the punishment appellants received for [the attempted murder counts]. The intent to challenge and fight Shane and his friends supported their punishment for the gang enhancement, and the intent to terrify the community by their display of violence supported their punishment for the substantive gang offense[.]"

However, the evidence shows the intent to fight and kill was inextricably linked to the overarching objective of the attack, which was to promote/benefit appellants' gang. In fact, in finding the gang allegations true, the jury specifically determined that the attempted murder counts were committed to promote/benefit appellants' gang. Therefore, we find unpersuasive respondent's attempt to parse out separate intents and objectives in this case. Because the street terrorism offense and the underlying felonies were carried out during a single criminal episode, and because the crimes were part and parcel of a core objective to promote/benefit appellants' gang,

section 654 applies here to prohibit separate punishment for the crime of street terrorism. Therefore, we will modify appellants' sentences to stay punishment for that offense.

VI

The final issue is whether on the attempted murder counts appellants were properly subjected to both the penalty provisions set forth in section 186.22, subdivision (b) and the penalty provisions set forth in section 12022.53. Because Resendiz did not personally use a firearm in the commission of the attempted murders, he should not have been punished under both sections. However, we find both penalty provisions applicable to Arroyo.

On the attempted murder counts, the trial court sentenced appellants to life in prison with the possibility of parole. (§ 664, subd. (a).) Based on the jury's finding the attempted murders were committed to benefit appellants' gang and a principal personally used and intentionally discharged a firearm during their commission, the court imposed a 20-year enhancement under section 12022.53, subdivisions (c) and (e)(1). In addition, the court imposed a minimum parole eligibility period of 15 years under section 186.22, subdivision (b)(5).

Discussing the interplay between sections 12022.53 and 186.22, subdivision (b), the court in *People v. Gonzalez* (2010) 180 Cal.App.4th 1420 explained, "Ordinarily, a gun enhancement under section 12022.53 applies only to a defendant who *personally* used or fired a gun. . . . But when gang members such as [appellants] commit a crime for the benefit of their gang, section 12022.53, subdivision (e)(1) of the gun statute makes all principals to the crime subject to the gun enhancement if any principal used a gun. Subdivision (e)(1) states:

"'The enhancements provided in this section shall apply to any person who is a principal in the commission of [a gang-related] offense if both of the following are pled and proved:

"'(A) The person violated [the gang crime provisions of] subdivision (b) of section 186.22.

"'(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d) [defining various uses of a gun in a crime].'

"While a section 12022.53, subdivision (e)(1) allegation expands the gun enhancement's reach to cover unarmed gang members, subdivision (e)(2) operates in the opposite way by exempting unarmed gang members from the gang enhancement's provisions. Subdivision (e)(2) of the gun statute states: 'An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.' In short, 'a defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 and the increased punishment provided for in section 12022.53. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an "enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to" section 12022.53. (§ 12022.53(e)(2).)' [Citations.]" (*People v. Gonzalez, supra,* 180 Cal.App.4th at pp. 1424-1425, fn. omitted, quoting *People v. Brookfield* (2009) 47 Cal.4th 583, 590.)

Here, it is undisputed Resendiz did not personally use a firearm in the commission of the attempted murders. Therefore, since he received a 20-year firearm enhancement under section 12022.53, he should not have been subjected to the 15-year minimum parole eligibility period set forth in section 186.22, subdivision (b)(5). (*People v. Gonzalez, supra,* 180 Cal.App.4th at p. 1427.) We will modify his sentence accordingly.

Arroyo's situation is very different, however. We agree with him that the jury must find the defendant personally used a firearm in the commission of the subject

offense before he can be sentenced to both the penalty provisions in section 186.22, subdivision (b) and 12022.53, subdivisions (b) through (e). (See § 12022.53, subd. (j) [facts supporting firearm enhancement must be proven or admitted]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"].) But we disagree with his contention that the jury did not make such a finding as to him in this case.

In fact, in count 3, the jury specifically found Arroyo guilty of discharging a firearm from a motor vehicle. (§ 12034, subd. (c).) As compared to the other three counts, only Arroyo was charged in this count. And although the prosecutor relied on aiding and abetting principles in arguing the attempted murder counts, her primary theory in the case was that Arroyo was the shooter. The prosecutor did not rely on aiding and abetting principles to obtain Arroyo's conviction for shooting from a motor vehicle. To the contrary, she stated that, unlike the attempted murder counts, the only way the jurors could convict Arroyo of shooting from a motor vehicle was if they found "him to be the shooter." Indeed, as to that particular count, the prosecutor repeatedly emphasized she had to prove Arroyo "willfully and maliciously shot a gun from a car."

Arroyo correctly notes that as to that count, the jury was unable to reach a verdict on the special allegation that he personally discharged a firearm and thereby caused great bodily injury to the victims. (§ 12022.53, subd. (d).) However, that's likely because Shane wasn't injured at all in the shooting, and Andrew suffered only a minor wound that was remedied with a couple of stitches. Because neither of them suffered "significant or substantial physical injury" (§ 12022.7, subd. (f)), the section 12022.53, subdivision (d) enhancement was inapt for that reason alone. Accordingly, the jury's inability to reach a verdict on that enhancement allegation does not imply the jury found Arroyo did not personally use a firearm.

Given the way the case was charged, proven, argued and decided, it is clear the jury did in fact find that Arroyo personally used a firearm in a gang-related crime. Therefore, he was properly subjected to both the penalty provisions in section 186.22, subdivision (b) and the penalty provisions in section 12022.53, subdivision (c).

DISPOSITION

The judgment is modified to stay appellants' sentences for street terrorism in count 4. (§ 654.) In addition, Resendiz's sentence for attempted murder in counts 1 and 2 is modified from 15 years to life in prison, to life in prison with parole. The clerk of the superior court shall prepare amended abstracts of judgment reflecting these modifications and send certified copies to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.